Supreme Court, U.S.
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No. 00-

IN THE
Supreme Court of the United States

RUSSELL JOHN GODFREY,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Pennsylvania Superior Court violate Appellant's right, as enunciated in the Fifth Amendment to the United States Constitution, by not awarding Appellant a new trial where the Trial Court refused to permit the jury to consider Appellant's claim of self defense despite the introduction of evidence establishing self defense?

Did the Pennsylvania Superior Court violate Appellant's right, as enunciated in the Fifth Amendment to the United States Constitution, by refusing to address the issue of whether a prosecutor is permitted to personally present expert evidence during closing argument where no expert or other witness presented such evidence during the trial?

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OPINIONS BELOW

The Pennsylvania Supreme Court's Opinion was not officially reported. The denial of Petition for Allowance of Appeal was issued on December 7, 1999. The Pennsylvania Supreme Court denied the Petition for Allowance of Appeal on December 7, 1999. The Opinion of the Pennsylvania Superior Court, affirming the decision of the Montgomery County Court of Common Pleas, was not reported as it was a Memorandum Decision, and is provided as Appendix A. The Opinion of the Montgomery County Court of Common Pleas, denying the Post-Verdict Points Raised on Appeal, is provided as Appendix B.

JURISDICTION

The judgment petitioner seeks to have the Court review was entered on December 7, 1999. There is no applicable order for rehearing. No Order has been entered extending the time in which to file the petition for Writ of Certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment to the Constitution of the United States

Due Process

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

BASIS FOR JURISDICTION

The Commonwealth brought criminal action against the Defendant alleging simple assault and related summary offenses.

The situation leading to the criminal charges began several years before the eventual incident which culminated in Defendant Godfrey's arrest. Defendant's next-door neighbor, Kenneth Kurilla, developed a disdain for Defendant, and engaged in ongoing taunting and intimidating of Godfrey at various locations within their neighborhood — an upper middle class community of single homes. On several occasions Kurilla accused Godfrey of destroying his property and of throwing rocks and stones onto his patio. Godfrey denied these allegations and Kurilla admitted during the course of the trial that his accusations had no basis in fact. Kurilla testified during the trial that he knew Godfrey was intimidated by his threats and conduct, and that he felt free to harass and challenge Godfrey since he knew Godfrey was afraid of him. Kurilla stated that he knew Godfrey would never agree to fight him but that even if Godfrey had agreed, he (Kurilla) knew Godfrey wouldn't stand a chance against him. It should be noted that Kurilla is not only younger than Godfrey, but is also taller, heavier and far more muscular than Godfrey.

One particularly horrendous incident occurred when Godfrey drove his automobile to the nearby mall and stopped at the light at a congested five-point intersection. Kurilla saw Godfrey, stopped his own car in the middle of the street, and challenged Godfrey to a fight in the middle of the busy intersection. Godfrey refused and immediately drove off.

On the day of the arrest, Kurilla approached Godfrey's property where Godfrey had just come outside to sit on his porch, drink coffee and read the Sunday paper. Kurilla stalked menacingly toward Godfrey's property, shouting at Godfrey and challenging him to a fight. As a result of Kurilla's years of escalating harassment and threats of fights, Godfrey felt intimidated and felt that he needed to protect himself. Godfrey went inside his house, picked up a replica of an antique revolver, and told Kurilla as he, Godfrey, exited his home, that he did not want to see their dispute boil down to firearms.

Godfrey then raised the gun, pointed it away from Kurilla, and fired into the air. Kurilla never saw the gun fired at him. Kurilla called the police. The police arrived and arrested Godfrey. Godfrey cooperated at all levels, allowing the police to search his residence without a warrant and offering a statement without the benefit of counsel being present.

The matter proceeded to trial. Following presentation of the evidence, Defendant submitted his written Request for Points for Charge, asking the Court to instruct the jury that the Defendant was entitled to a self-defense instruction. Closing argument then ensued.

During closing argument, the Prosecutor told the jury that she had training as an Assistant District Attorney, which included firing guns on the police range. She stated that based on that police range experience she knew that guns fired in a certain manner and it was her opinion that the Defendant endangered Kurilla. She stated during argument that based on her experience, it was a fact that even though Godfrey fired away from Kurilla, Kurilla was in danger of being struck

by the fired bullet. The Prosecutor conceded by her statement that the information she was offering to the jury was outside the probable range of their knowledge. Nevertheless, the Prosecutor did not produce any expert witness to testify as to the trajectory of the bullet, nor did she introduce any evidence to support her statement that Kurilla was in immediate danger when the gun was discharged while being pointed away from him. Godfrey moved for a mistrial immediately after the Prosecutor's remarks. The Court denied the request. Thereafter, at the conclusion of closing arguments Defendant asked the Court to rule on his request to instruct the jury that it could consider self-defense during its deliberations. The Court denied Defendant's Requested Points for Charge.

The jury deliberated and returned a verdict of guilty on charges of Simple Assault and Recklessly Endangering Another Person as well as a summary offense.

Godfrey was sentenced to a term of imprisonment of two months to twenty-three months and a fine of $500 on the simple assault and a two-year probationary term plus a $1,000 fine for the Reckless Endangerment charge.

Defendant raised various points on appeal in the Superior Court, the first Appeals Court in Pennsylvania. The Superior Court affirmed the Trial Court. The Superior Court Opinion cited general propositions of law on the points raised but did not address these points in the context of this specific case. Instead the Superior Court merely referred to the Trial Court Opinion and attached that Opinion in case Defendant should decide, as he did, to present a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania.

The Superior Court's Opinion does not address the facts of this case, thereby failing to afford Defendant an adequate review of the errors he alleged occurred during the trial. The Superior Court failed, as did the Trial Court, to consider or discuss the Defendant's testimony that he felt endangered and threatened when Kurilla advanced onto his property.

The judgment of the Court of Common Pleas was entered on September 11, 1998. A Notice of Appeal was filed to the Superior Court on August 11, 1998. The Superior Court entered judgment on March 23, 1999, adopting the Trial Court's Opinion in totality. A Petition for Allowance of Appeal was filed with the Pennsylvania Supreme Court on April 23, 1999. The Pennsylvania Supreme Court denied Defendant's Petition for Allowance of Appeal without entering an opinion.

Defendant alleges that the prosecution's closing remarks violated his right to a fair trial, in that the Prosecutor acted as an expert witness during closing argument and although a timely objection was made, the Court allowed the closing argument, in the form of expert testimony, to be heard. The prosecution's overreaching denied Defendant the opportunity to cross-examine any alleged expert witness on that point and further, by the prosecutor's allegations of personal knowledge, the point argued gained credibility without affording the defense the opportunity to challenge the evidence.

STATEMENT OF MATERIAL FACTS

The appeal raises significant Fifth Amendment issues concerning a judge's power to remove a claim of self-defense from the jury's consideration. This appeal also raises a

significant issue involving the Fifth Amendment as the Fifth Amendment relates to the prosecutor's introduction of expert evidence to the jury during closing argument when no expert witness testified to that evidence during the course of the trial and the defendant is not able to rebut or cross-examine the evidence presented.

John Godfrey ("Godfrey") was the defendant in a criminal proceeding in which he was charged with a simple assault and various weapons offenses.

Godfrey had long been the victim of taunts and threats of violence by his younger and more athletic neighbor. One Sunday morning, while he sat outside reading a Sunday magazine, Godfrey was verbally accosted by his neighbor with false allegations involving damage to his property. Shortly thereafter the neighbor began to advance onto Godfrey's property and Godfrey, fearful after his neighbor's past threats of physical harm, went into his residence and emerged with a gun. Godfrey fired the gun away from the direction of his neighbor to warn his neighbor, as he told the police, to stop his neighbor from advancing and to warn his neighbor that he could not tolerate being threatened with physical violence any longer.

During the trial, Godfrey presented evidence of numerous complaints he filed with the police over several years regarding the neighbor's threats. The neighbor also testified he intended to make Godfrey fear his physical presence. Despite the testimony, the Trial Court did not permit the theory of self-defense to be presented to the jury.

Additionally, the prosecutor stated during closing argument that she had experience with firearms during her

training as a prosecutor. The prosecutor went on to say that as a result of her district attorney training, she had information the jury did not possess, and as a result of that training she knew that the bullet fired by Defendant away from the neighbor could have harmed the neighbor despite the direction that the gun was pointed.

The jury returned a verdict of guilty. Godfrey appealed to the Pennsylvania Superior Court that affirmed and thereafter filed an appeal to the Pennsylvania Supreme Court that dismissed Godfrey's petition for Allowance of Appeal.

STATEMENT OF THE CASE

Factual Statement of the Case

The police arrested John Godfrey on June 29, 1997, as the result of an allegation by his neighbor Kenneth Kurilla. June 29, 1997, was the day of John Godfrey's arrest but it was not the first incident between Godfrey and Kurilla. For years prior to June 29, 1997, Kurilla had threatened and intimidated Godfrey by stopping him on the road and by repeatedly threatening him with physical injury and challenging him to public fights which he wanted viewed by the entire neighborhood. Kurilla engaged in an incessant campaign of false accusations accusing Godfrey of malicious conduct despite the fact that there was not a scintilla of evidence to support any of these claims.

Godfrey, on the other hand, wrote letters and brought a private criminal complaint against Kurilla because of his constant attempts to disrupt Godfrey's sleeping patterns and because of his threats and malicious accusations.

On the day of Godfrey's arrest, Kurilla came out of his house and found a broken beer bottle on his patio. When Godfrey walked outside to sit at his patio table to read the Sunday newspaper, Kurilla immediately accused him of throwing this beer bottle. Kurilla gestured at Godfrey and then challenged him to a fight on the street as he pointed to the public area in front of their houses. Godfrey responded by throwing pebbles at Kurilla's garden. Kurilla continued to be abusive and began to advance onto Godfrey's property. Godfrey then went into his house and retrieved a replica of an antique revolver to demonstrate to Kurilla his fear and anxiety which Kurilla instilled in him over several years by threatening him with physical harm. While Godfrey was in his residence, Kurilla continued to advance onto Godfrey's property. Godfrey came outside and raised the gun. Kurilla then ran to his house, never seeing the direction that Godfrey pointed the gun. Kurilla, a few seconds later, heard a shot. Godfrey stated he fired at the bushes and not at Kurilla. Godfrey admitted he raised the gun to stop Kurilla from advancing further onto his property.

Godfrey testified that Kurilla's conduct over the years and specifically on June 29, 1997, caused him to be in fear and he needed to let Kurilla know that Kurilla could no longer act in that manner.

Kurilla then called the police who arrived at Kurilla's residence. Kurilla told the police what occurred but did not tell the police that he wrongfully accused Godfrey of throwing a beer bottle; did not tell the police that he threatened Godfrey; did not tell the police he challenged Godfrey to a fight; did not tell the police of his prior acts of intimidation directed at Godfrey, and, did not tell the police that he had advanced onto Godfrey's property.

Godfrey told the police of the prior incidents and the reason for his actions. He cooperated fully with the police and the police believed that Godfrey's statement was truthful and accurate.

The case proceeded to trial. After the close of the evidence, Defendant submitted a written Request for Points for Charge asking the Court to instruct the jury that the Defendant was entitled to a self-defense charge. Closing argument then ensued.

During closing argument, the Prosecutor told the jury that she had training as an Assistant District Attorney, which included firing guns on the police range. She stated that based on that police range experience she knew that guns fired in a certain manner and it was her opinion that the Defendant endangered Kurilla. She stated during argument that based on her experience, it was a fact that even though Godfrey fired away from Kurilla, Kurilla was in danger of being struck by the fired bullet. The prosecutor did not produce any expert witness to testify as to the trajectory of the bullet, nor did she introduce any evidence to support her statement that Kurilla was in immediate danger when the gun was discharged while being pointed away from him.

Godfrey moved for a mistrial immediately after the Prosecutor's remarks. The Court denied the request. Thereafter, at the conclusion of closing arguments the Defendant asked the Court to rule on his request to instruct the jury that it could consider self-defense during its deliberations. The Court denied Defendant's Requested Points for Charge.

The jury deliberated and returned a verdict of guilty as to Simple Assault and Recklessly Endangering Another Person as well as a summary offense.

Godfrey was sentenced to a term of imprisonment of two months to twenty-three months and a fine of $500 on the simple assault and a two-year probationary term plus a $1,000 fine for the Reckless Endangerment charge.

The Defendant raised various points for appeal in the Superior Court. The Superior Court affirmed the Trial Court. The Superior Court Opinion cited general propositions of law on the points raised but did not address these points at all in the factual context of the case. Instead the Superior Court referred to the Trial Court Opinion and attached that opinion in case the Defendant should decide, as he did in the Court below, to present a Petition for Allowance of Appeal to The Supreme Court of Pennsylvania.

The Superior Court's Opinion did not address the facts in this case thereby failing to afford the Defendant an adequate review of the errors he alleged occurred during the trial. Neither the Superior Court nor the Trial Court discussed Defendant's testimony that he felt threatened when Kurilla advanced onto his property. The Superior Court also failed to directly comment upon the Prosecutor's argument where she held herself out as an expert witness. The Superior Court did not cite any appellate authority to permit a prosecutor to present what is essentially expert testimony during closing argument. The Superior Court only addressed improper prosecutorial accusations involving a prosecutor's expression of a defendant's guilt. Defendant has been unable to locate any case in the Commonwealth of Pennsylvania or elsewhere that permits the prosecutor to appear as an expert in closing

argument despite the fact that the prosecutor never introduced any expert during the trial to form a foundation for that argument.

ARGUMENT

REASONS FOR GRANTING THE WRIT

OVERVIEW

A COURT CANNOT REMOVE FROM A JURY'S CONSIDERATION A CLAIM OF SELF-DEFENSE AFTER THE DEFENDANT PRESENTED NUMEROUS FACTUAL ISSUES SUPPORTING THAT CLAIM. ADDITIONALLY, A PROSECUTOR CANNOT TAKE ON THE ROLE OF BOTH A PROSECUTOR AND AN EXPERT WITNESS DURING THE COURSE OF A CRIMINAL TRIAL.

This is a matter of first impression in that Defendant was a victim of his neighbor's malicious conduct for years and years, and was the constant subject of both verbal and physical intimidation and threats. Finally, after Defendant could stand no more, he had to act. He got a gun to protect himself as his neighbor advanced onto to his land to show the neighbor that enough was enough. Defendant likens this act of self-defense to a woman who is battered by her husband over many years and finally acts in self-defense.

The second issue centers on the Prosecutor's remarks where the Prosecutor presents herself as an expert witness in closing argument to contradict the Defendant's testimony despite the fact that no expert witness ever testified during the course of the trial.

This case presents the important question of whether a defendant is effectively denied due process when the Trial Court allows a prosecutor to argue expert testimony to the jury during closing argument without the presentation of an expert witness. Clearly this cannot be allowed. Our justice system is very clear that a defendant is entitled to know what testimony will be presented against him and is permitted to present his own witnesses to testify in his defense. When a prosecutor fails to notify a defendant of expert testimony, that testimony is either disallowed or the defense is permitted to present its own expert. Further, no expert testimony can be presented without the defense having an opportunity to cross-examine the witness. Finally, in no instance is evidence presented by the prosecutor or during closing argument

I.

PETITIONER IS ENTITLED TO A NEW TRIAL AS A RESULT OF THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY THAT IT COULD CONSIDER WHETHER DEFENDANT ACTED IN SELF DEFENSE.

It is in the sole province of the jury to determine whether a defendant acted in self-defense. *See Commonwealth v. Mayfield*, 401 Pa. Super. 560, 585 A.2d 1069 (1991).

Self-defense is not a defense predicated upon the injury to the alleged victim but is, rather, a defense founded on the underlying reason for the defendant's actions. *Mayfield*, supra. If the jury determines that Mr. Godfrey's neighbor, Kenneth Kurilla, acted in such a way that Godfrey feared for his safety, even possibly his life, then the issue of self-defense was properly before the jury. The Trial Court and the Superior Court, by implication, failed to consider whether

and how Kurilla's actions influenced Godfrey to act in the manner in which he did.

It is the province of the jury to determine whether Mr. Godfrey was free of provocation or, whether Godfrey had the duty to retreat when Kurilla started to advance onto Godfrey's property. It was also the jury's duty to determine whether Godfrey was justified in his belief that he was in danger of serious bodily harm and whether his use of force was reasonable at that time. *Commonwealth v. Buska*, 655 A.2d 576 (Pa. Super 1995). The Trial Court cannot summarily take away Defendant's right to have the jury determine whether he acted in self-defense simply because the Court felt that the factual evidence presented by the Defendant did not meet the Court's personal standard of self-defense.

It is not the injury to the victim or the possible injury to the victim that determines whether self-defense is proper and reasonable. It is Defendant's personal belief that he was in danger that is controlling. Self-defense is a defense that centers on a defendant's reasonable belief. Self-defense is not viewed from the eyes of the alleged victim, as a number of trial courts seem to improperly hold. *See Commonwealth v. Jones*, 231 Pa. Super. 300, 332 A.2d 464 (1974); *Commonwealth v. Mayfield*, supra.

Evidence from any source that Appellant was acting in self-defense requires that the Court instruct the jury on the self-defense principle. *Commonwealth v. Gonzalez*, 483 A.2d 902 (Pa.Super. 1984) citing *Commonwealth v. Brown*, 491 Pa. 507, 421 A.2d 660 (1980). The burden of proof never shifts to the defendant when self-defense is presented. The burden of proof always remains on the Commonwealth.

Commonwealth v. Gonzalez, supra. It is the jury's duty to determine the credibility of a defendant and not that of the Court. *Commonwealth v. Gonzalez*, supra. It is not the province of the Court to pre-determine whether a defendant should be acquitted when he requests that the jury be instructed on self-defense. That is exactly what happened in this case.

Although Godfrey cannot locate a Federal Appellate directly on point, the defense of entrapment sheds light on the issue raised in this case.

In the *United States v. Perez-Leon*, 757 F.2d 866 (7th Cir.), *cert. denied*, 106 S. Ct. 99 (1985); *United States v. Andrews*, 666 F.2d 918 (5th Cir. 1982); and *United States v. Branden*, 633 F.2d 773 (9th Cir. 1980), the courts held that defense of entrapment must be submitted to the jury where the evidence presents issues of fact concerning inducement and predisposition.

In the present matter the factual pattern is obvious. Godfrey's neighbor put Godfrey in fear of his life and Godfrey, acting from fear and reacting to his neighbor's intrusion onto his property, acted in self-defense. Godfrey never intended to harm or kill his neighbor, as is evident from the charges, but only intended to protect himself by putting the same fear into his neighbor that his neighbor placed on him.

Minimum due process requirements demanded that the jury be informed on the rights to self-defense. The Pennsylvania Supreme Court has long recognized this right and Godfrey asks this Honorable Court to adopt Pennsylvania's standard.

Pennsylvania authority recognizes that any individual has the right to defend himself from an improper assault and not be found guilty of any criminal conduct.

In this situation, Defendant, John Godfrey, was clearly more of a victim than his neighbor. Kurilla, based upon his own admissions to the police, his testimony during the course of the trial and Mr. Godfrey's testimony, embarked on a course of conduct years earlier to cause John Godfrey to live his life in fear of his own neighbor. The record is replete with instances where Kurilla unwarrantedly accused Godfrey of damaging his property; made efforts to disrupt Godfrey's sleep pattern on a regular basis; challenged Godfrey to fights on the street in front of his home; cut off Godfrey's car at busy major intersections; and, finally, came onto Godfrey's property on several occasions to challenge Godfrey to a fight in front of the entire neighborhood. It is not only Godfrey's testimony that required the Trial Court to instruct the jury as to self-defense. The pattern of conduct complained of by Godfrey is supported by Kurilla's own testimony. Kurilla boasted in Court that he knew that he could beat up Godfrey prior to the incident and he firmly stated at trial that he wanted to fight Godfrey on the day of the incident and he wanted to do it publicly. These were obviously rantings of an incensed, dangerous individual. Yet, the Court refused to issue a self-defense instruction for the jury's determination.

Even if the Court discounted Godfrey's testimony, which it cannot do, Kurilla's testimony alone is sufficient to permit the jury consider the self-defense instruction specifically requested by Defendant.

As previously stated several times in this Writ for Certiorari, if there is sufficient evidence to allow a jury to consider self-defense, then the jury must be instructed as to

self-defense. Often times the Courts must consider cases essentially "in a vacuum" because there are no other cases directly or nearly directly on point. This is not the case in this particular matter.

Basically, Godfrey's neighbor falsely accused Godfrey of malicious conduct and then challenged him to fight on the public street in front of their homes in their upper-middle class neighborhood. Godfrey was in fear after all of the years of abuse that Kurilla subjected him to and, as a result, retreated into his house to get a gun to defend himself against Kurilla's physical menace.

Kurilla started to advance onto Godfrey's adjoining backyard. Godfrey raised a pistol and Kurilla retreated. Neither the Trial Court nor the Superior Court ever discussed Godfrey's frame of mind and his justifiable fear of imminent bodily injury based on Kurilla's conduct. Even the Commonwealth in its closing argument, told the jury that some of Kurilla's conduct cannot be justified. The Trial Court stated that Defendant's resort to deadly force could not be justified under these circumstances and, thus, the self-defense instruction was not required under the facts of this case. It appears that Godfrey's use of a gun after Kurilla put him in fear of serious bodily injury and threats of force was the Trial Court's basis for refusal of the self-defense instruction.

An examination of the appropriate appellate authority will lead this Honorable Court to conclude to the contrary.

In *Commonwealth v. Mayfield*, supra, the victim pulled out a knife in self-defense and the Trial Court instructed the jury in that case that the defendant's use of the knife justified a finding of guilt. The Superior Court reversed. The Superior Court held that:

> We find appellant's testimony that he pulled the knife in preparation to use it against the victim in defense of himself to be sufficient showing of a use of deadly force to at least put the question of self-defense before the jury.

Commonwealth v. Mayfield, supra at 1077 citing *Commonwealth v. Jones*, 231 Pa. Super. 300, 332 A.2d 464 (1974).

Although *Mayfield* is a case where both parties used deadly force, the use of a deadly force, i.e., a knife, by the Defendant did not preclude him from having the jury consider self-defense. In *Mayfield* the Superior Court aptly stated that:

> It remains the province of the jury as to whether appellant was free of provocation, as to whether his belief that he was in danger of serious bodily harm or death was reasonable, and as to whether his use of deadly force was excessive under the circumstances.

Commonwealth v. Mayfield, supra at 1078. (Emphasis supplied).

The Superior Court has consistently held that if a defendant is threatened and employs a deadly weapon to defend himself, any evidence from any source that demonstrates that the Defendant was in fear of serious bodily harm will justify a self-defense instruction. *Commonwealth v. Mayfield*, supra; *Commonwealth v. Brown*, supra.

Commonwealth v. Diamond, 268 Pa. Super. 326, 408 A.2d 488 (1979), is a case rather similar in factual pattern to

the present action. In *Diamond*, an individual came up to a car and the person in the vehicle responded by brandishing a gun. The individual who came up to the car was the individual arrested. The person in the vehicle who pulled the gun was not arrested. Although this case can be distinguished from the matter at hand, it led to another Superior Court opinion, *Commonwealth v. Rittle*, 428 A.2d 168 (Pa. Super. 1981), a case supporting a reversal in this matter.

The facts in the *Rittle* case are strikingly similar to the facts of this case. The Trial Court in *Rittle* refused to instruct the jury on self-defense, but on appeal the Superior Court reversed. The facts of these two cases are so similar that if the Superior Court holding in this action is not reversed, the opinion issued by the Superior Court in this matter effectively overrules *Rittle*.

The *Rittle* Court begins Its Opinion as follows:

> It is clear that if there is evidence from any source that a defendant acted in self-defense, that the defendant is not only entitled to have the issue presented to the jury but in addition is entitled to a charge that the burden is upon the Commonwealth to prove beyond a reasonable doubt that the defendant was not acting in self-defense. See *Commonwealth v. Cropper*, 463 Pa. 529, 345 A.2d 645; *Commonwealth v. Flagg*, 266 Pa. Super. 508, 405 A.2d 934 (1979); *Commonwealth v. Hetherington*, 477 Pa. 562, 385 A.2d 338 (1978); *Commonwealth v. Lesher*, 473 Pa. 141, 373 A.2d 1088 (1977); *Commonwealth v. Webster*, 490 Pa. 322, 416 A.2d 491 (1980): *Commonwealth v. Terrell*, — Pa. Super. —, 419 A.2d 133 (1980).

In *Rittle*, the victim, Pete Palsitevas, saw Rittle in a vehicle in a parking lot. Rittle then got out of his vehicle, struck a person, then got back into the vehicle. Palsitevas exited his van and approached Rittle's vehicle. Palsitevas told Rittle to get out of his vehicle. Palsitevas admitted at trial that he sounded angry as he spoke to Rittle. Rittle then reached behind his seat and grabbed a gun which he pointed at Palsitevas. Palsitevas then froze and walked away as did Kurilla who went back to his home.

According to Rittle, Palsitevas told him that "he was going to beat the shit out of [him]." *Rittle* at 169. Rittle was substantially smaller in stature than Palsitevas, just as Godfrey is substantially smaller than Kurilla. Finally, Rittle testified that he was afraid of Palsitevas because he, Palsitevas, was "real angry." Obviously, Kurilla was "real angry" as he strode toward Godfrey. The facts of this case demand an instruction as to self-defense much more than the facts did in *Rittle*.

Here, unlike *Rittle*, Kurilla had made his intentions known many, many times — he wanted to fight Godfrey and could beat him badly. This time, however, Kurilla started to advance onto Godfrey's property and toward Godfrey.

In *Rittle*, the Superior considered the evidence and stated:

> Rittle admitted reaching for and pointing the gun at Palsitevas. The jury, after hearing this evidence, returned a verdict of guilty of simple assault. Appellant argues that based upon the evidence he was entitled to a charge on the use of force in self-protection.

Rittle at 169.

Rittle properly argued that a self-defense instruction was required because he feared that an angry person physically superior would beat him. In this action, Godfrey pulled a gun out of fear that he was about to be beaten to a pulp by his younger, far more physically developed and athletic neighbor. Rittle pulled a gun to protect himself from the anger of his aggressor, as did Godfrey. The jury returned a verdict of guilty to simple assault in both cases. Both Rittle and Godfrey requested a charge instructing the jury as to self-defense. In both cases the Trial Court denied that requested charge. In *Rittle* the Superior Court reversed the conviction. In this case it did not.

The concluding paragraphs in *Rittle* are appropriate to end this portion of Defendant's presentation:

> We agree that the jury could conclude that Palesitevas as the initial aggressor attempted by physical menace to put appellant in fear of imminent serious bodily injury. Recently, our court found that similar conduct was sufficient to amount to simple assault. In *Commonwealth v. Diamond*, 268 Pa.Super. 326, 408 A.2d 488 (1979), the defendant was convicted of simple assault when he ran up to the victim's car after the victim had swerved to avoid hitting him and gripped the door handle of the victim's car.
>
> Under these circumstances, we conclude that appellant was entitled to an instruction on the defense of use of force in self-protection.
>
> Judgment of sentence reversed and new trial granted.

II.

PETITIONER WAS ENTITLED TO A MISTRIAL WHERE THE PROSECUTOR STATED IN CLOSING ARGUMENT THAT SHE HAD PERSONAL KNOWLEDGE AND EXPERIENCE WITH FIREARMS WHICH CONTRADICTED THE TESTIMONY OF DEFENDANT, AND PROCEEDED TO SET FORTH TESTIMONY ABOUT GUNSHOT TRAJECTORIES DESPITE THE FACT THAT THE COMMONWEALTH NEVER INTRODUCED A FIREARMS OR BALLISTICS EXPERT DURING THE COURSE OF THE TRIAL.

The issue presented in this section seeking a Writ of Certiorari is simple. The implications are far reaching. Factually, the prosecutor told the jury during closing argument that she had been trained with firearms and based upon that training, it was her opinion that Defendant recklessly endangered the alleged victim. The prosecutor told the jury that based upon her training they should be aware that it was impossible to determine where a bullet would go when you discharged a firearm. At no time during the trial was any witness ever introduced on the issue of firearms, nor was any firearms related testimony elicited from the two police officers who testified.

Appellant made a timely objection and requested a mistrial which the Trial Court overruled and denied.

A prosecutor's argument must be based upon the evidence presented. Appellant's research has not disclosed any case where a prosecutor made argument based upon his or her particular "expertise" despite the fact that no evidence

about that expertise was presented during the course of the trial. All of the cases found deal with a prosecutor who tries, purposefully or inadvertently, to inflame the jury so that there will not be a finding based purely upon the evidence presented during the trial.

The Defendant requests that this Honorable Court reverse his conviction and inform all prosecutors that a trial must be based on the evidence and not on facts and personal opinions not of record.

The issue is always whether a prosecutor's remarks during closing argument deprived the Defendant of a fair trial. *Commonwealth v. Morales*, 701 A.2d 516 (Pa. 1997). Although the granting of a mistrial is within the discretion of the Trial Court, *Commonwealth v. D'Ambro*, 456 A.2d 140 (Pa. 1983), once that language giving rise to the mistrial motion goes beyond acceptable limits and deprives a Defendant of a fair trial, a mistrial must be declared. *Commonwealth v. Simon*, 432 Pa. 386, 248 A.2d 289 (1968). *See also Commonwealth v. Meyers*, 290 Pa. 573, 139 A. 374 (1927).

The Fifth Amendment mandates that each Defendant receive a fair trial. A prosecutor has the right to be zealous in the government's prosecution of an alleged law violator. A prosecutor cannot act unfairly and disregard the accusers' rights. *United States v. Carter*, 566 F.2d 1265 (11th Cir. Fla. 1978), *certiorari denied*, 98 S. Ct. 3069, 436 U.S. 956, 57 L. Ed. 2d 1211.

Directly on point is the appellate opinion in *United States v. Garza*, 608 F.2d 659 (5th Cir. Tex. 1979). In *Garza*, the prosecutor assumed the role of an expert witness during

closing argument. In closing a prosecutor can assist the jury in analyzing, evaluating and applying the evidence. The prosecutor can state her conclusions but when the closing argument goes beyond that point and the prosecutor becomes a witness who introduces new evidence, harmful error requires a new trial result.

"It is improper for a prosecutor to ask questions which imply the existence of a factual predicate and which attempt to create impressions of guilt." *Commonwealth v. Larkin*, 489 A.2d 837 (Pa. Super. 1985).

The importance of the prosecution's closing argument in any criminal trial is aptly expressed in *Commonwealth v. Johnson*, 533 A.2d 994 (Pa. 1987):

> On the other hand, we have decided with equal clarity that there are lines of permissible conduct which cannot be crossed in the interest of basic fairness and justice. Because a jury tends to attach special importance to the Commonwealth's arguments, we are compelled to guard against utterances that unduly inflame and prejudice those members. *Commonwealth v. Kuebler*, 484 Pa. 358, 399 A.2d 116 (1979).
>
> In broad terms, we have drawn the first and brightest line at the point where the language and inferences of the summation no longer relates back to the evidence of record. In effect, the prosecutor is bound by our law to argue only those inferences which derive reasonably from the evidence of the trial.

Commonwealth v. Joyner, 469 Pa. 333, 365 A.2d 1233 (1976); *Commonwealth v. Maloney*, 469 Pa. 342, 365 A.2d 1237 (1976). The *Johnson* Court went onto state that the prosecutor's expressions of personal belief are improper and prevent the jury from its determination of innocence or guilt. "[That] principle runs long and deep in our jurisprudence." *Johnson* at 996. (Citations omitted.)

Our Courts have not hesitated to set aside convictions where the prosecutor makes personal assertions that lack proper evidentiary foundation and which improperly prejudice the jury during its deliberations.

In the present action, the prosecutor made a remark that falls squarely in the province of an expert witness. Concededly, a gun is a dangerous instrument which, by itself, causes a jury to examine the evidence with extra scrutiny. When the prosecutor adds to that scrutiny by introducing "facts" not of record, the bias that a defendant faces when charged with an offense involving a gun is substantially magnified. In the instant matter, it is clear that the prosecutor intended to contradict the testimony of Defendant without introducing appropriate expert testimony, and intended to improperly influence the jury.

The Trial Court in this action did not, even after the Defendant's objection, give the jury a cautionary instruction. The relevant portion of the trial transcript is as follows:

> MS. ELLIOTT: I don't know how many of you shoot. I went to a shooting range as part of my indoctrination to become an assistant district attorney, and I might tell you that what I thought I was aiming at that silhouette —

> MR. GUTKIN: Objection. I will move for a mistrial. Counsel cannot testify as an expert in shooting a gun. She's going way beyond her province as a D.A. about how she shoots a gun.
>
> MS. ELLIOTT: Your Honor, he told a story about his trial, how horrendous it was. I'm not being an expert.
>
> THE COURT: I don't see anything wrong with that.
>
> MS. ELLIOTT: . . . When I tried to shoot at the silhouette, it didn't go within that frame. The gun is a powerful thing, and what I'm trying to suggest and I believe you will see, that when you fire it, you don't know where it's going.

The Trial Court conceded that these remarks were outside of the record but were not, in Its opinion, improper. The Court stated that the prosecutor was testifying about things of common knowledge such as the addictive qualities of heroin. These two issues are not even similar. An expert always testifies to the path of a bullet. The addictive nature of heroin does not require any proof outside of our own life experiences. Ballistics, on the other hand, is a subject for expert testimony.

Reasonably, if firing a gun were something everyone had experience with, the Prosecutor would not have been likely to say anything about her experience — it was specifically because she believed the jurors did *not* have that experience that she said it. It was a statement intended to make the jurors base their decision on her experience and "testimony" and not on anything else. Her statement was

specifically meant to rebut the testimony of the Defendant about where he pointed the gun prior to firing it. That is impermissible.

Secondly, her experience was clearly not that of most gun users. If it were true that when a gun is fired, "you don't know where it's going," there would be no science of ballistics, which is based on the premise that when you fire a gun it is possible to know exactly where that bullet will go. It is also hard to imagine that the government of this Commonwealth or any other government would permit anyone to own a gun if, when fired, the bullet trajectory would be impossible to predict. It is obvious that if expert testimony had been presented, no expert would have reinforced the statements of the Prosecutor.

The Trial Court stated that the prosecutor argued a matter of common knowledge. Defendant has two problems with this theory. First, the prosecutor's statements are simply not true. Frankly, if you could never know where a bullet was going to go, there would be no such thing as ground troops, hunting season or shooting ranges, and nobody would ever be allowed to own a gun. If it was a fact that you could never know where a bullet would end up, there could be no ballistics or firearms experts, and there could be no gunshot trajectory reconstruction. Clearly, the District Attorney's inability to shoot a bullet into a target cannot possibly be definitive. Finally, the prosecutor admitted by her words that it was not a matter of common knowledge, and that was why she was telling the jury these things. No case exists which either agrees or disagrees with either the Courts below or Defendant. Godfrey submits that any reference to the path of a bullet requires expert testimony and, thus, he is entitled to a new trial based upon the evidence and not on a prosecutor's imagined expertise.

CONCLUSION

The Defendant, John Godfrey, submits that the Trial Court, the Superior Court and the Pennsylvania Supreme Court erred.

The record in this action is unusual in that the aggressor admitted to the police and to the jury that he had for years menaced, threatened and intimidated Mr. Godfrey. Kurilla further admitted that on the day of the occurrence leading to Mr. Godfrey's arrest he challenged Godfrey to a fist fight on the public street in front of their detached homes in an affluent area of Montgomery County.

Further, Godfrey testified that Kurilla advanced onto his property before he, Godfrey, acted in self-defense. These facts dictated that the Trial Court instruct the jury as to the self-defense claim of Mr. Godfrey. The case authority is clear. An individual can brandish a gun in his own defense even if the aggressor has no weapon on his person. The criteria is not the possible harm to the aggressor but, rather, is whether a defendant had a reasonable belief that he was in danger and had to defend himself. If any evidence exists which would allow a person to think that the defendant would be in fear, then the self-defense instruction must be offered to the jury.

The Superior Court's holding in this action is directly contrary to its earlier holding in *Rittle*. A matter is appropriately before the Supreme Court of Pennsylvania when two opinions of the Superior Court directly contradict each other. Defendant submits that this is the case presently before This Honorable Court.

The second issue presented to This Honorable Court is that of a prosecutor arguing facts not of record. Making the error even worse is the fact that the prosecutor discussed her personal experiences with handguns and her inability to accurately fire such a gun. She then attributed her own lack of expertise to Defendant. Based upon that lack of expertise she suggested that Defendant's testimony was not truthful.

Defendant argues that the prosecutor's closing remarks overstepped the bounds of proper argument.

For the foregoing reasons, the Petitioner believes and avers that the ruling of the Lower Courts in this matter are directly contrary to the United States Constitution. The holding of the Supreme Court will directly affect all Defendants who seek to exercise a self-defense claim as well as preventing a prosecutor from commenting on "evidence" not presented during the course of the trial.

This is a case of first impression and is related to the far-reaching issue of a defendant's right to receive a fair trial. A prosecutor cannot be allowed to influence a jury's verdict by arguing "facts" not in evidence.

There is no case in any reported in any jurisdiction, Federal or State, where the prosecutor so flagrantly disregards Defendant's to a fair trial as here. The Commonwealth's closing remarks were calculated to influence the jury and to create a bias from which Defendant could not escape.

The proper remedy when such abuse occurs is dismissal of the charges and not just the award of a new trial. The testimony clearly demonstrated that no evidence existed

pointing to Defendant's guilt. The only possible reason for the finding of guilt by the jury arose out of the purposeful misconduct of the prosecutor in this action.

This Honorable Court must make it clear to all prosecutors that such tactics will be rejected by the Courts and that the Court will impose a sanction that will not permit the prosecution a second shot at the apple.

For the reasons submitted, Defendant respectfully requests that the Supreme Court of United States grant Defendant's Writ of Certiorari and allow argument to resolve the issues presented herein.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM AND JUDGMENT OF THE SUPERIOR COURT OF PENNSYLVANIA DATED AND FILED MARCH 23, 1999

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 2510 Philadelphia 1998

COMMONWEALTH OF PENNSYLVANIA

Appellee

VS

RUSSELL JOHN GODFREY,

Appellant

Appeal from the Judgment of Sentence of July 14, 1998
In the Court of Common Pleas of Montgomery
County, Criminal No. 3947-97

BEFORE: MCEWEN, P.J., POPOVICH, J., AND CIRILLO, P.J.E.

MEMORANDUM:

Russell John Godfrey appeals from the judgment of sentence entered in the Court of Common Pleas of Montgomery County. We affirm.

Godfrey was charged and ultimately convicted by a jury of simple assault (physical menace) and recklessly

endangering another person (REAP). The events leading to his conviction stem from a confrontation between Godfrey and his neighbor, Kenneth Kurilla. The two neighbors had a bitter and cantankerous relationship; in fact, for years they had accused one another of acting maliciously and intentionally damaging the other's property.

On June 29, 1997, after a heated verbal exchange which included Godfrey throwing pebbles at Kurilla's garden, Godfrey retreated to his house, obtained a gun, and moved quickly toward Kurilla, pointing the barrel of the gun at Kurilla. Kurilla immediately began to run the other way, soon after which he heard a shot fired from Godfrey's gun.

During trial, the court refused to instruct the jury, despite the defense's request, on the defense of self-defense. Godfrey was sentenced to a term of imprisonment of two to twenty-three months and a fine of $500.00 on the simple assault conviction and a two-year probationary term plus a $1,000.00 fine for the REAP conviction.[1] Godfrey filed a timely direct appeal and presents the following issues for our review:

(1) Whether the trial court erred in not granting a mistrial when the prosecuting attorney in closing argument related her personal

---

1. Godfrey was also charged with harassment and violation of the Montgomery Township ordinance prohibiting the discharge of firearms. While Godfrey was acquitted of the harassment charge, he was found guilty and sentenced for violation of the township ordinance, a summary offense, in the amount of a $300.00 fine, plus costs.

experiences with firearms and her personal opinion of the accuracy of firearms?

(2) Whether the evidence was insufficient for the jury to find the Defendant guilty of simple assault and recklessly endangering another person?

(3) Whether the trial court erred in not instructing the jury on self-defense and refusing to instruct the jury as to two suggested points for charge relating to self-defense?

Generally, comments by a prosecutor do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict. ***Commonwealth v. Morales***, __ Pa. __, 701 A.2d 516 (1997); ***Commonwealth v. D'Ambro***, 500 Pa. 303, 309-10, 456 A.2d 140, 144 (1983). Prosecutorial misconduct will not be found where comments were based on the evidence or proper inferences therefrom or were only oratorical flair. ***Commonwealth v. Marshall***, 534 Pa. 488, 509, 633 A.2d 1100, 1110 (1993). Moreover, in order to evaluate whether the comments were improper, we must look at the context in which they were made. ***Commonwealth v. Carpenter***, 533 Pa. 40, 48-49, 617 A.2d 1263, 1267 (1992).

It is well settled that a prosecutor must have reasonable latitude in presenting his case and must be free as well to make his arguments with "logical force and vigor."

Commonwealth v. Cronin, 464 Pa. 138, 346 A.2d 62 (1975). ***See also Commonwealth v. Sattazahn***, 631 A.2d 597 (Pa. Super. 1993). Additionally, it is clear that not every intemperate or improper remark by the prosecution requires a new trial. ***Commonwealth v. Jarvis***, 482 Pa. 598, 394 A.2d 483 (1978). Nonetheless, a prosecutor may not base his or her summation on a personal belief that the defendant is guilty. ***Commonwealth v. Johnson***, 516 Pa. 527, __, 533 A.2d 994, 996 (1987). A prosecutor, therefore, is bound by law to argue only those references which are reasonably derived from the evidence of the trial. ***Id.*** (citing ***Commonwealth v. Joyner***, 469 Pa. 333, 365 A.2d 1233 (1976); ***Commonwealth v. Maloney***, 469 Pa. 342, 365 A.2d 1237 (1976)).

The decision to grant a new trial on the basis of prosecutorial misconduct depends upon whether improper evidence was admitted at trial "that would prejudice the fact finder that it would be unable to remain impartial, thereby prejudicing the accused beyond a reasonable doubt." ***Commonwealth v. Bruner***, 564 A.2d 1277, 1287 (Pa. Super. 1989). Examples of prejudicial conduct include clear references to prior unrelated criminal activity by the accused and the admission of testimony "which does not directly establish appellant's prior criminal conduct, but which is merely suggestive of it" and from which a jury could infer past criminal conduct. ***Commonwealth v. Thomas***, 521 A.2d 442, 449-50 (Pa. Super. 1987) (citing ***Commonwealth v. DeCampli***, 364 A.2d 454, 457 (Pa. Super. 1976)) (citations omitted). This requirement, moreover, is entirely consistent with the proposition that it is improper for a prosecutor to ask questions and present evidence in an attempt to infer

guilt through mere innuendo. ***Commonwealth v. Larkins***, 489 A.2d 837, 840 (Pa. Super. 1985)).

In evaluating a challenge to the sufficiency of the evidence, we must determine whether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner, together with all reasonable inferences therefrom, the trier of fact could have found that each and every element of the crimes charged was established beyond a reasonable doubt. ***Commonwealth v. Jarman***, 529 Pa. 92, 94-95, 601 A.2d 1229, 1230 (1992); ***Commonwealth v. Swann***, 635 A.2d 1103 (Pa. Super. 1994). "This standard is equally applicable to cases where the evidence is circumstantial rather than direct so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt." ***Commonwealth v. Swerdlow***, 636 A.2d 1173, 1176 (Pa. Super. 1994) (citing ***Commonwealth v. Hardcastle***, 519 Pa. 236, 246, 546 A.2d 1101, 1105 (1986)). ***See also Commonwealth v. Chmiel***, 536 Pa. 244, 639 A.2d 9 (1994). Furthermore, a mere conflict in the testimony of the witnesses does not render the evidence insufficient because "it is within the province of the factfinder to determine the weight to be given to the testimony and to believe all, part, or none of the evidence." ***Commonwealth v. Moore***, 648 A.2d 331, 333 (Pa. Super. 1994) (citations omitted).

The question we must ask about a proposed charge to the jury is whether it is warranted by the evidence presented in the case. ***Commonwealth v. Mayfield***, 585 A.2d 1069, 1075 (Pa. Super. 1991) (citing ***Commonwealth v. Schaller***, 493 Pa. 426, 431, 426 A.2d 1090, 1093 (1981)). If the requested instruction is inapplicable and improper, the court

should not charge on it. ***Commonwealth v. Cottam***, 616 A.2d 988, 999 (Pa. Super. 1992) (citing ***Commonwealth v. Kyle***, 533 A.2d 120, 133 (Pa. Super. 1987)). Then we must examine the charge in its entirety against the background of the evidence to determine whether or not the error, if there was one, was prejudicial to the defendant. ***Commonwealth v. Woodward***, 483 Pa. 1, 4, 394 A.2d 508, 510 (1978). Thus, our examination begins with the question of whether the trial court erred in refusing the charge; only if we answer that question in the affirmative, do we consider whether the error prejudiced the defendant. ***Id.*** If we determine the decision not to give an instruction was an error of law which might have prejudiced the defendant, then we must determine the error was not harmless before granting a new trial. ***Commonwealth v. Lesher***, 473 Pa. 141, __, 373 A.2d 1088, 1093 (1977).

After a review of the parties' briefs, the record on appeal, and pertinent case law, we find that the trial court opinion more than adequately addresses the issues raised on appeal. We, therefore, rely upon the trial court opinion in affirming Godfrey's judgment of sentence. A copy of the trial court opinion is attached for purposes of allowance for appeal.

Judgment of sentence affirmed.

Appendix A

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 2510 Philadelphia 1998

COMMONWEALTH OF PENNSYLVANIA

Appellee

VS

RUSSELL JOHN GODFREY,

Appellant

Appeal from the Judgment of Sentence of July 14, 1998
In the Court of Common Pleas of Montgomery
County, Criminal No. 3947-97

BEFORE: MCEWEN, P.J., POPOVICH, J., AND CIRILLO, P.J.E.

JUDGMENT

ON CONSIDERATION WHEREOF*, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of* MONTGOMERY *County be, and the same is hereby* AFFIRMED.

BY THE COURT:

s/ [illegible]
PROTHONOTARY

Dated: MARCH 23, 1999

APPENDIX B — OPINION OF THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA, CRIMINAL DIVISION DATED SEPTEMBER 11, 1998 AND FILED SEPTEMBER 14, 1998

COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

NO. 3947-97

COMMONWEALTH OF PENNSYLVANIA

v.

JOHN RUSSELL GODFREY

OPINION

LOWE, S.J. SEPTEMBER 11, 1998

On March 18, 1998, the defendant, John Russell Godfrey, was found guilty by a jury of simple assault — physical menace, in violation of 18 Pa.C.S. §2701(a)(3), and recklessly endangering another person, in violation of 18 Pa.C.S. §2705. Following the jury's verdict we found him guilty of violating the Montgomery Township ordinance prohibiting the discharge of firearms, and not guilty of the summary offense of criminal harassment, 18 Pa.C.S. §2709.

On July 14, 1998, he was sentenced to undergo a term of imprisonment of not less than two (2) nor more than twenty-three (23) months, to pay a fine of $500., and the

costs of prosecution on the charge of simple assault. On the charge of recklessly endangering another person he was sentenced to two (2) years probation from the expiration of his parole, a fine of $1,000., and the costs of prosecution. On the township ordinance violation he was sentenced to pay a fine of $300., plus costs.

The charges arose from events that took place on June 29, 1997, the culmination of a long, unhappy relationship between next door neighbors on Gray's Lane in Montgomery Township, Montgomery County. The relations between defendant Russell Godfrey, and his neighbor Ken Kurilla, were friendly at first, but deteriorated in 1991 or 1992. Mr. Godfrey made numerous complaints to Mr. Kurilla and to the police about the Kurillas' barking dog, noises allegedly emanating from the Kurilla house, and other incidents of harassment. Mr. Godfrey filed a private Criminal Complaint against Mr. Kurilla. Mr. Kurilla made several complaints to the police about Mr. Godfrey.

On June 29, 1997, Mr. Kurilla found a broken beer bottle on his property which he believed was thrown by Mr. Godfrey. Mr. Kurilla, who was frustrated and angry, accused Mr. Godfrey, who was sitting in his back yard, of harassing him. Mr. Kurilla offered to go out in front, on the street, with Mr. Godfrey, to "settle the matter". Mr. Godfrey threw some rocks onto Mr. Kurilla's property. The incident escalated, with Mr. Kurilla stepping across the property line and again offering to fight, out front, in the street. Mr. Godfrey went inside the house and returned with a loaded revolver. He raised his arm, pointing it in the general direction of Mr. Kurilla. Mr. Kurilla turned and ran, and heard a shot fired.

Appendix B

Mrs. Kurilla called the police. The police interviewed Mr. Godfrey on the scene, and at the police station. In his signed statement, Mr. Godfrey admitted:

A.) "I was sitting on my patio, drinking a cup of coffee. While I was sitting there quietly doing nothing, my neighbor, Ken Kurilla, went to the rear of his garden, where he could see me, and made threatening motions for me to come over and get on with it. I felt threatened by this and went over by the fence and pulled two small rocks and threw them at some boards in his garden. I was not aiming at him. Prior to this, while he was motioning to me, I said to him something like 'What's wrong with you, what do you want?' He said let's go out into the street and settle this, or let's go out into the street and get it on.'

Q.) What happened next?

A.) I felt totally frustrated and a need to make a stronger statement. I wanted him to know the seriousness of the situation. I went into the house and loaded a single shell into my collector's item. I went out with the gun in my hand. He was still standing there. I cocked it and fired it at the weeds in the area behind his yard. I was not aiming at him. I have never pointed a gun at anybody. It was my intention to make a statement as to the

> seriousness of the problem and that I could defend myself." (Exhibit C-4)

At trial Mr. Godfrey admitted that his statement about placing a single bullet in the revolver was untrue. The revolver was already fully loaded. After he fired one bullet, he returned to the house and removed the five unfired rounds from their chambers.

Mr. Godfrey testified that he was never struck by Mr. Kurilla, and that there had never been physical contact between them, before or on that day. The request to fight was verbal only. Mr. Kurilla's entry onto Mr. Godfrey's property was limited to standing just inside Mr. Godfrey's property line, right next to the Kurillas' garden.

The defendant raises five issues in his Concise Statement of Matters Complained of on Appeal. They are:

> "1. The Trial Court erred in not permitting the Defendant to testify concerning many of the numerous incidents leading to the events giving rise to the criminal charges."

This assertion is incorrect. The defendant testified extensively, over the prosecutor's objection, about the history of these neighbors' bad relations. (N.T. 3/17/98 at 102-123; N.T. 3/18/98 at 53-58) At the outset of this testimony the prosecuting attorney objected to its protracted nature, and asserted it was collateral. We asked the defendant if he could abbreviate it a little, and his counsel responded "Fair enough." (N.T. 3/17/98 at 104) The narrative continued, and

the prosecutor objected that there was no question. Defense counsel agreed to begin with a question. (N.T. 3/17/98 at 104-105) After objections relating to the lack of a time frame, we allowed Mr. Godfrey to continue with his narration. (N.T. 3/17/98 at 106) We overruled the prosecutor's objection to the continuing narrative (N.T. 3/17/98 at 122), and Mr. Godfrey completed his explanation. He provided additional detail on redirect examination. (N.T. 3/18/98 at 53-58)

At no time did we limit Mr. Godfrey's testimony. There was no objection by the defendant to any limitation, nor was an offer of proof made concerning anything else to which Mr. Godfrey wished to testify. Absent such an offer, any claim that the testimony was improperly limited was waived. *Commonwealth v. Fisher*, 545 Pa. 233, 681 A.2d 130, 143 (1996). It was not limited at all.

The next issue is:

> "2. The Trial Court erred in not granting a mistrial when the prosecuting attorney in closing argument related her personal experiences with firearms and her opinion of the accuracy of firearms."

The argument and objection were:

> "I don't know how many of you shoot. I went to a shooting range as part of my indoctrination to become an assistant district attorney, and I might tell you that what I thought I was aiming at that silhouette —

MR. GUTKIN: Objection. I will move for a mistrial. Counsel cannot testify as an expert in shooting a gun. She's going way beyond her province as a D.A. about how she shoots a gun.

MS. ELLIOTT: Your Honor, he told a story about his trial, how horrendous it was. I'm not being an expert.

THE COURT: I don't see anything wrong with that.

MS. ELLIOTT: Mr. Gutkin relived some golden years of yesterday, and I felt that a story of mine might be apropos as well.

When I tried to shoot at the silhouette, it didn't go within that frame. The gun is a powerful thing, and what I'm trying to suggest and I believe you will see, that when you fire it, you don't know where it's going.

Mr. Kurilla was in his backyard. We know when he was in his backyard. We know the general direction of the tree and the area that Mr. Godfrey, at least, admits to was in Mr. Kurilla's backyard. Therefore, I submit to you that by firing this weapon, he recklessly endangered the life of another person." (Transcript of closing remarks of Assistant District Attorney at 12-14)

Appendix B

These remarks, while relating an experience outside the record, were not improper. The Assistant District Attorney was responding to Mr. Godfrey's assertions at trial and his counsel's closing argument that he did not intend to hit anyone, and was not aiming *at* Mr. Kurilla. A prosecutor may argue facts that are matters of common experience. *Commonwealth v. Banks*, 228 Pa. Super. 308, 323 A.2d 780, 782 (1974); *Commonwealth v. Danzy*, 234 Pa. Super. 633, 340 A.2d 494, 497 (1975). The argument made by the prosecutor, the difficulty of aiming the gun and having the bullet go where you want, is a matter of widespread, if not universal, experience, and no different in kind or degree than the argument made in *Commonwealth v. Banks*, *supra.*, concerning the strong, addictive and lethal qualities of heroin and the incidence of death from its use. In addition, as we will discuss below, neither offense of which Mr. Godfrey was convicted required that he aim at Mr. Kurilla. Next, the defendant asserts:

> "3. The evidence was insufficient for the jury to find the Defendant guilty of simple assault and terroristic threats."

We assume that the defendant means to challenge the sufficiency of the evidence of the crime of recklessly endangering another person, of which he was convicted, and not terroristic threats, with which he was never charged.

The defendant was convicted of simple assault — physical menace, in violation of 18 Pa.C.S. §2701(a)(3), which provides:

Appendix B

"Simple assault

(a) Offense defined. — A person is guilty of assault if he:

* * *

(3) attempts by physical menace to put another in fear of imminent serious bodily injury."

He was also convicted of recklessly endangering another person, in violation of 18 Pa.C.S. §2705:

"Recklessly endangering another person

A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury."

Evidence is sufficient to convict when, viewing the evidence and all reasonable inferences in the light most favorable to the Commonwealth, it is sufficient to establish the elements of the crime beyond a reasonable doubt. *Commonwealth v. Little*, 418 Pa. Super. 558, 614 A.2d 1146, 1148 *allocatur denied*, 533 Pa. 608, 618 A.2d 399 (1992). In *Little* the defendant was convicted of two counts of simple assault by physical menace, in violation of 18 Pa.C.S. §2701(a)(3). Two deputy sheriffs arrived at the defendant's home to serve a writ of execution. While the deputies were sitting in their car, filling out a levy sheet, the defendant came out of the front door holding a shotgun. When they

saw this the deputies radioed for state police backup. After she emerged from the house several more times, with the shotgun in hand, the deputies abandoned their efforts to make personal service or post the property. The Court held this evidence sufficient to place the deputies in fear of imminent, serious bodily injury, sufficient to establish simple assault by physical menace beyond a reasonable doubt.

The evidence in this case is certainly as strong. Mr. Godfrey raised a loaded revolver and pointed it in the direction of Mr. Kurilla, if not right at him. He fired a shot in the direction of Mr. Kurilla from a revolver that appeared to, and did, contain five more rounds. Clearly, by physical menace, he put Mr. Kurilla in fear of serious bodily injury.

In *Commonwealth v. Mitchell*, 381 Pa. Super. 592, 554 A.2d 542 (1989), the Superior Court upheld an adjudication of delinquency based on recklessly endangering another person. The juvenile, who was struggling with a police officer trying to arrest him, unsnapped the officer's holster so his pistol could be removed. Even though the gun was not actually pointed, because the juvenile had the actual, present ability to inflict harm and there was a strong possibility the revolver could discharge, the evidence was sufficient. The Court, in reaching its decision, noted that it was foreseeable that other pedestrians would be placed in danger by that conduct.

Mr. Godfrey pointed a loaded revolver at Mr. Kurilla and fired it. He very clearly engaged in reckless conduct and placed Mr. Kurilla, and perhaps other persons in that residential neighborhood, in danger of death or serious bodily injury.

Appendix B

The evidence was sufficient for the jury to find, beyond a reasonable doubt, that Mr. Godfrey was guilty of simple assault and recklessly endangering another person.

The remaining issues raised by the defendant are related:

> "4. The Trial Court erred in not instructing the jury on self-defense.
>
> 5. The Court erred in failing to instruct the jury as follows:
>
> Point for Charge #4:
>
> The use of force upon or toward an [*sic*] another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the unlawful force by such other person on the present occasion. Pa. Crimes Code sec. 505.
>
> Point for charge #5:
>
> The use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary:
>
> (1) to prevent or terminate an unlawful entry or other trespass upon land . . . if such land is believed by the [Defendant] to be in his possession. Pa. Crimes Code sec. 507."

Appendix B

There was no evidence that would permit a jury to find self defense or the justifiable use of force for the protection of property. Both defenses are defined by statute. 18 Pa.C.S. §505(a) provides:

> "Use of force justifiable for protection of the person. — The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion."

No evidence in the case would have supported a finding that Mr. Kurilla was using unlawful force on the present occasion. Both Mr. Kurilla and Mr. Godfrey agreed that Mr. Kurilla was merely offering to fight in another location, out on the street. The force employed by Mr. Godfrey was in no sense immediately necessary to protect himself from any force, as Mr. Kurilla employed none. The jury need not be instructed on self-defense when there is no evidence to support it. *Commonwealth v. Washington*, 547 Pa. 563, 692 A.2d 1024, 1028-1029 (1997) *cert. denied*, __ U.S. __, 140 L.Ed.2d 320, 118 S.Ct. 1190 (1998).

This is also not a case in which there was any evidence concerning the use of force for the protection of property. The Point for Charge #5, quoted above, is incomplete and inaccurate. When read in conjunction with Point for charge #4, which addresses self-defense, it would appear that a lesser degree of danger, mere trespass on land, will justify force to protect property, while greater danger is required to use force

to protect a person. That would be an inaccurate statement of the law.

The proposed instruction ignores the fact that the force used, the firing of a weapon, was deadly force, which is justifiable only when the provisions of 18 Pa.C.S. §507(c)(4) are met:

> "(4)(i) The use of deadly force is justifiable under this section if:
>
> (A) there has been an entry into the actor's dwelling;
>
> (B) the actor neither believes nor has reason to believe that the entry is lawful; and
>
> (C) the actor neither believes nor has reason to believe that force less than deadly force would be adequate to terminate the entry.
>
> (ii) If the conditions of justification provided in subparagraph (i) have not been met, the use of deadly force is not justifiable under this section unless the actor believes that:
>
> (A) the person against whom the force is used is attempting to dispossess him of his dwelling otherwise than under a claim of right to its possession; or

(B) such force is necessary to prevent the commission of a felony in the dwelling."

There was no entry into Mr. Godfrey's dwelling, there was no attempt to dispossess him of his dwelling, nor was there any evidence that Mr. Kurilla was committing a felony inside the dwelling. Thus, the instruction was not required. *Commonwealth v. Horner*, 497 Pa. 565, 442 A.2d 682, 687 (1982). The proposed instruction also misstated the law. The Court is not bound to give instructions that do not reflect the proper articulation of the law. *Commonwealth v. Holland*, 480 Pa. 202, 389 A.2d 1026, 1034 (1978).

None of the matters raised by the defendant on this appeal have merit.

BY THE COURT:

s/ [illegible]
S.J.

APPENDIX C — ORDER OF THE SUPREME COURT OF PENNSYLVANIA FOR THE MIDDLE DISTRICT DENYING PETITION FOR ALLOWANCE OF APPEAL DATED DECEMBER 7, 1999

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 409 Middle District
Allocatur Docket 1999

Petition for Allowance of Appeal
from the Superior Court

COMMONWEALTH OF PENNSYLVANIA,

Respondent

v.

RUSSELL J. GODFREY,

Petitioner

ORDER

PER CURIAM:

AND NOW, this 7th day of December, 1999, the Petition for Allowance of Appeal is hereby DENIED.